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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL SAOLE, JR.,

Defendant and Appellant.

G052046

(Super. Ct. No. 97NF1880)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,  
Lance Jensen, Judge. Affirmed.

Marilee Marshall, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant  
Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and  
Kristen Hernandez, Deputy Attorneys General, for Plaintiff and Respondent.

Paul Saole, Jr., appeals from the trial court's postjudgment order denying his petition for resentencing under Proposition 36, the Three Strikes Reform Act of 2012 (Proposition 36 or the Act), codified at Penal Code section 1170.126.<sup>1</sup> Saole argues an arming enhancement, found true by the jury but dismissed by the trial court for sentencing purposes, may not be used to disqualify him for resentencing under section 1170.126. We disagree and affirm the post judgment order.

## I

An information charged Saole with transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a); count 1), and possession for sale of methamphetamine (Health & Saf. Code, § 11378; count 2). The information further alleged as to counts 1 and 2 that Saole was personally armed with a firearm pursuant to section 12022, subdivision (c), and that Saole possessed and sold 28.5 or more grams of methamphetamine or 57 or more grams of a substance containing methamphetamine pursuant to section 1203.073, subdivision (b)(2). The information also alleged Saole suffered two prior violent felony convictions (§ 667, subds. (d), (e)(2)), and a prior prison term (§§ 667.5, subd. (b), 1170.12, subds. (b), (c)(2)).

After the trial court dismissed count 1 on the prosecution's motion, the jury found Saole guilty of count 2. The jury found true the section 12022, subdivision (c), handgun enhancement, concluding Saole was "personally armed with a firearm" at the time of the commission of the felony. At a bifurcated proceeding, the trial court found true two prior serious felony convictions for robbery. The court struck the allegation pursuant to section 1203.073, subdivision (b)(2), and the enhancements pursuant to sections 12022, subdivision (c), and 667.5, subdivision (b), for purposes of sentencing. The trial court sentenced Saole to a term of 25 years to life in prison pursuant to sections 667, subdivisions (d), and (e)(2), and 1170.12, subdivisions (b), and (c)(2).

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<sup>1</sup> All further statutory references are to the Penal Code, unless otherwise indicated.

In 2014, Saole filed a petition for recall of sentencing and request for resentencing under section 1170.126. The trial court denied Saole's petition.

## II

In 2012, California passed Proposition 36. (*People v. Johnson* (2015) 61 Cal.4th 674, 679.) "Proposition 36 reduced the punishment to be imposed with respect to some third-strike offenses that are neither serious nor violent, and provided for discretionary resentencing in some cases in which third strike sentences were imposed with respect to felonies that are neither serious nor violent." (*Ibid.*) Under the Act, the trial court first determines "whether a defendant is qualified or disqualified from seeking a recall of sentence." (*People v. Quinones* (2014) 228 Cal.App.4th 1040, 1043 (*Quinones*)). "[I]f, and only if, a defendant is found to be qualified, the trial court conducts a hearing, and then applies certain standards to determine whether the defendant's sentence should be lessened. [Citations.]" (*Ibid.*) The Act disqualifies from resentencing circumstances where, during the commission of the current offense, the defendant was armed with a firearm. (§§ 667, subd. (e)(2)(C)(iii), 1170.126, subd. (e)(2).)

The trial court correctly found Saole's offense disqualified him from resentencing pursuant to sections 667, subdivision (e)(2)(C)(iii), and 1170.12, subdivision (c)(2)(C)(iii). The jury found true the allegation Saole was armed with a firearm at the time of the commission of the crime. While the trial court struck the section 12022, subdivision (c), firearm enhancement, it made sure to note this was done "for purposes of sentencing only." The fact the trial court exercised its discretion during sentencing to decline to impose the additional term for the firearm enhancement does nothing to change the fact that "[t]he jury found beyond a reasonable doubt that defendant possessed a firearm during the commission of the offense[]." (*Quinones, supra*, 228 Cal.App.4th at p. 1044.)

*Quinones* is directly on point. The Third Appellate District considered whether an arming enhancement, found true by the jury but stricken for sentencing purposes, operated to bar resentencing under the Act. (*Quinones, supra*, 228 Cal.App.4th at p. 1042.) The *Quinones* court determined the firearm enhancement disqualified the defendant for resentencing and affirmed the order denying resentencing. (*Id.* at p. 1045.)

Saole urges us not to follow *Quinones* by arguing it is not binding authority. While we are aware that an opinion of an appellate court in another district is not controlling, we are mindful that such a decision is persuasive authority. (*People v. McDonald* (2013) 214 Cal.App.4th 1367, 1377.) Saole cites to no argument or authority which would cause us to doubt the sound reasoning of the *Quinones* court.

### III

The postjudgment order is affirmed.

O'LEARY, P. J.

WE CONCUR:

FYBEL, J.

THOMPSON, J.